

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 9 OF 1997.

Pravin Jagdish Bhargav,
residing at Flat No.5, 3rd floor,
"Jagdish Kunj" Holly Hoc Housing
Society Ltd. Indernarain Cross
Lane, Santacruz (West),
Mumbai 400 054.

.... Appellant.
(Org.Plaintiff)

Versus.

Municipal Corporation for Greater
Mumbai, representing by the Dy.
Commissioner, Zone-III, having his
office at H.P.Vibhag Karyalaya,
Gr.Bombay Municipal Office, St.
Martins Road, Bandra (West),
Mumbai 400 050.

.... Respondent.
(Org.Defendant.)

Shri M.P.Vashi for the Appellant.

Ms.V.K.Khatu for the Respondent.

CORAM : ABHAY S. OKA, J.

DATED : 22nd February, 2005.

ORAL JUDGMENT.

1. Heard the learned Advocates appearing for the parties.

2. The original Plaintiff has taken exception to the Judgment and Order dated 7th November 1996 passed by the learned trial Judge by which the Notice of Motion for temporary injunction taken out by the Appellant/Plaintiff has been dismissed.

3. The challenge in the suit filed by the Appellant is to the letter dated 30th January 1995 sent by the Deputy Municipal Commissioner, Zone-III of the Respondent-Corporation by which the Deputy Municipal Commissioner did not accept the reply filed by the Appellant to the notice dated 16th October 1993 issued under section 351 of the Bombay Municipal Corporation Act, 1888. The notice was issued alleging that there was an unauthorised construction admeasuring 4 meters x 4 meters with brick masonry wall with A.C. sheet roof. The reply of the Appellant was that the structure is in existence prior to 1961-62 and is being continuously assessed by the Assessment Department of the Respondent-Corporation and therefore, structure will have to be tolerated.

4. The learned trial Judge by the impugned Judgment and order held that prima facie the FSI which is consumed by the shed was already utilised by the buildings constructed after 1978 and therefore, the suit structure cannot be continued.

5. I have heard the learned Counsel appearing for the parties. With the assistance of the Counsel appearing for the parties I have perused the relevant documents on

record of the Appeal from Order. It is to be noted here that the main contention raised by the Appellant in reply to the Notice under section 351 as well as in the plaint was that the suit structure was in existence atleast from 1961-62. The claim was obviously made on the basis of the policy of the Respondent-Corporation of tolerating the old structures. A perusal of the impugned Judgment and Order shows that there is no primafacie finding recorded on the said contention raised by the Appellant. It is to be noted here that in the impugned communication dated 30th January 1995 itself it is mentioned as under:

"Though the structure under reference is assessed to Municipal taxes prior to 1961-62, the same is not shown in the plan, approved by Bombay Municipal Corporation for the building....."

Thus the impugned communication itself proceeds on the basis that the suit structure is assessed in the year 1961-62. In my view, this statement in the letter dated 30th January 1995 was more than sufficient to come to the conclusion that primafacie case has been established by the Appellant-Plaintiff.

6. The suit was filed in the year 1995. Initially the Appellant was protected by an ad-interim order. Thereafter this Court has granted interim protection in favour of the Appellant in this Appeal.

7. In the circumstances, the Appeal deserves to be allowed. Accordingly the impugned order and judgment is quashed and set aside and Notice of Motion No.1661 of 1995 is made absolute in terms of prayer clause (a) subject to condition that till final disposal of the suit, the Appellant will not carry out any additions or alternations to the suit structure without seeking prior permission of the trial Court. It is made clear that the trial Court will decide the suit on its own merits without being influenced by the observation in this Judgment. There will be no order as to costs.

8. Parties to act on authenticated copy of the order.

Judge.